COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-243

JOHN DOE, SEX OFFENDER REGISTRY BOARD NO. 92592

vs.

SEX OFFENDER REGISTRY BOARD.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

In 2005, John Doe pleaded guilty to six counts of indecent assault and battery on a child under fourteen, fifty-one counts of posing or exhibiting a child in a state of nudity, nine counts of posing or exhibiting a child in sexual conduct, and 293 counts of possession of child pornography. In 2010, the Massachusetts Sex Offender Registry Board (SORB) classified Doe as a level 3 (high risk) sex offender. Doe challenged this classification, and after a de novo hearing in 2016, the hearing examiner reaffirmed Doe's level 3 classification.[1] Doe filed a

[1] The 2016 hearing was the third administrative hearing reviewing Doe's level 3 classification, and the third time the same hearing examiner affirmed the classification. After the first hearing in 2011, the parties agreed to reopen the record "to consider new and updated evidence" regarding Doe's age. Then, after the second de novo hearing was held in 2014, the Supreme Judicial Court changed the standard of review to a clear and convincing standard, see Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 300 (2015),

complaint for judicial review, and a Superior Court judge affirmed the level 3 classification. We also affirm.

Background. We summarize the facts as set forth in the hearing examiner's 2016 decision, "supplemented by undisputed facts from the record." Doe, Sex Offender Registry Bd. No. 10800 v. Sex Offender Registry Bd., 459 Mass. 603, 606 (2011) (Doe No. 10800). In February of 2004, Yarmouth police were informed that Doe -- then forty-five years old -- had coerced an eleven year old girl, Jane,[2] into posing nude for photographs on several occasions.[3] Jane reported that several months earlier, Doe, who was entrusted with watching Jane after school on most Wednesdays, began asking her to try on tight-fitting, handmade bathing suits and to pose for photographs in them. In exchange for complying with his requests for the photographs, Jane "earn[ed]" money from Doe to use at a local amusement park. After approximately four weeks of this conduct, Doe upped the ante and asked Jane if she would pose nude for him, offering her more money (up to thirteen dollars) in return. Jane reported

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while Doe's appeal was pending. As a result, Doe secured his right to a third administrative hearing, which was held in 2016. The testimony from the prior two hearings were considered part of the record for the purposes of the third hearing.

[2] A pseudonym.

[3] This was brought to the attention of police after Jane's father found a homemade thong that Doe had given her as a Valentine's Day present.

that Doe photographed her nude four or five separate times.[4] In subsequent Sexual Assault Investigation Network (SAIN) interviews, Jane disclosed that Doe had also touched her leg and "rubbed and squeezed" her genital area over her pants on numerous occasions.

After executing a search warrant at Doe's home in South Yarmouth, police seized thousands of photographs of naked children, and three different computers containing child pornography. They also seized hundreds of videos, including footage from a hidden camera that had been placed inside his young daughter's bedroom.[5] Nine victims were identified, including Jane, Doe's daughter, and several of his daughter's friends. The videos from the camera in his daughter's bedroom dated back nearly a decade, to when his daughter was ten years old, and contained footage of her and her friends in varying stages of undress. Other seized videos showed Doe touching Jane's breasts while he helped her into the bathing suits, and captured him assuring Jane (erroneously) that the video camera

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[4] Jane also reported that when she did not comply with Doe's requests that she take off her clothing, he would refuse to take her to the amusement park, or only pay her "like three dollars."

[5] Among the videos found in Doe's possession were ones with titles such as "Easy Prey," "Do You Know The Muffin Man," "The Crying Child," "Devils Prey," "In The Best Interest Of The Child," [and] "Too Young To[] Die." Police also found news clippings and videos of the Joan Benet Ramsey murder investigation, "an article describing how to use chloroform and the effects of chloroform," and three small mannequins dressed as young girls.

was not, in fact, recording. Doe pleaded guilty to all indictments against him and was sentenced to concurrent terms of six to nine years in prison, followed by ten years of probation.

In concluding that Doe should be classified as a level 3 sex offender, the hearing examiner stated, "In considering all of the applicable statutory and regulatory factors, by clear and convincing evidence I find that [Doe] yet presents a high risk of reoffense. Given his dangerousness as suggested by his history of offending against multiple vulnerable extrafamilial children, and his escalation to contact offending, I find that active notification of his information is warranted to ensure public safety."

Discussion. Our review is limited, and "[w]e reverse or modify [SORB]'s decision only if we determine that the decision is unsupported by substantial evidence or is arbitrary or capricious, an abuse of discretion, or not in accordance with law." Doe No. 10800, 459 Mass. at 633, citing G. L. c. 30A, § 14 (7) (e), (g). "The appellant bears the burden of showing that one of these conditions has been met." Doe, Sex Offender Registry Bd. No. 380316 v. Sex Offender Registry Bd., 473 Mass. 297, 300 (2015) (Doe No. 380316), citing Coe v. Sex Offender Registry Bd., 442 Mass. 250, 258 (2004).

1. Regulatory risk factors. Doe argues that the hearing examiner erroneously applied several of the regulatory risk

factors, as set forth in G. L. c. 6, § 178K (1) (a)-(k), and 803 Code Mass. Regs. § 1.33 (2016). First, Doe claims that the hearing examiner improperly gave factor 2 (repetitive and compulsive behavior) "increased weight." In light of the sheer number of offenses Doe committed over an extended period of time, the hearing examiner acted well within her discretion in giving factor 2 "very heavy weight."[6] Doe argues that the particular wording of the regulation prevents the hearing examiner from awarding any such increased weight to factor 2. The regulation recognizes that "[t]he Board may give increased weight to offenders who have been discovered and confronted . . . or investigated by an authority for sexual misconduct and, nonetheless, commit a subsequent act of sexual misconduct." 803 Code Mass. Regs. § 1.33(2)(a). Doe suggests that such language in turn prohibits SORB from awarding more than nominal weight to factor 2 unless the sex offender was "discovered and confronted" in between offenses. We do not read the regulation as being so constricting. See Doe No. 380316, 473 Mass. at 301 n.5, quoting G. L. c. 30A, § 14 (7) (g) ("In reviewing the hearing examiner's decision, . . . we 'give due weight to the experience, technical

[6] The hearing examiner considered that Doe had repeated his offenses over the course of nearly ten years, and that his "years-long retention, for sexual gratification, of the images he took of children changing their clothing was a sign of his compulsivity." See 803 Code Mass. Regs. § 1.33(2).

competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it'").

We are similarly unpersuaded by Doe's argument that the hearing examiner erred by giving only tempered weight to several mitigating factors. With regard to factor 32 (sex offender treatment), the hearing examiner concluded that although Doe "was deemed a [sex offender] treatment completer" and continues to attend a weekly support group, he still had not "come to terms with the full extent of his sexual attraction to pubescent children, despite his years of treatment." In her decision, the hearing examiner carefully analyzed the evidence, and cited to several instances in which Doe had minimized the severity and extent of his past offenses. Accordingly, awarding tempered mitigating weight to factor 32 was not an abuse of discretion. See id.

Doe's next argument is based on factor 33 (home situation and support systems). Having a support system is considered a mitigating factor because "[t]he likelihood of reoffense is reduced when an offender is supported by family, friends, and acquaintances." 803 Code Mass. Regs. § 1.33(33)(a). Although the hearing examiner credited the fact that Doe was living in an over-fifty community with his parents, and had additional support from other family members, she also took into account the reality that Doe's mother recently had passed away and his

father was suffering from dementia. Considering the fact that Doe's level of support had diminished -- albeit through no fault of his own -- was not an abuse of discretion. See Doe No. 10800, 459 Mass. at 633.

Doe also suggests that the hearing examiner improperly discounted psychological expert Dr. Leonard Bard's opinion that Doe was at a low risk to reoffend.[7] It is well established that a hearing examiner is "not bound to accept [an expert's opinion]," provided her evaluation of the risk factors supports a different conclusion. Doe, Sex Offender Registry Bd. No. 1211 v. Sex Offender Registry Bd., 447 Mass. 750, 764 (2006). See Wyatt, petitioner, 428 Mass. 347, 360 (1998), quoting Commonwealth v. DeMinico, 408 Mass. 230, 235 (1990) (experts not given "benefit of conclusiveness, even if there are no contrary opinions introduced at the trial"). The record establishes that the hearing examiner carefully weighed Dr. Bard's testimony before discounting his opinion, noting that Dr. Bard did not take into account several of the risk factors she was statutorily mandated to consider, including "the repetitive and compulsive nature of [Doe's] offending behaviors, his multiple

[7] Dr. Bard produced a written evaluation and testified at Doe's 2014 administrative hearing.

[v]ictims, and the length of time over which he committed his many offenses."[8] There was no abuse of discretion.

2. Substantial evidence of level 3 classification. Doe next contends that his level 3 classification was not based on substantial evidence. "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Doe No. 10800, 459 Mass. at 632, citing G. L. c. 30A, § 1 (6). "As 'long as [SORB's] interpretation of its regulations and statutory mandate is rational, and adhered to consistently, it should be respected,' and given substantial deference." Smith v. Sex Offender Registry Bd., 65 Mass. App. Ct. 803, 813 (2006), quoting Midland States Life Ins. Co. v. Cardillo, 59 Mass. App. Ct. 531, 537 (2003). "It is the province of [SORB], not this court, to weigh the credibility of the witnesses and to resolve any factual disputes." Doe No. 10800, supra at 633, and cases cited.

Doe challenges the hearing examiner's subsidiary factual findings only to a limited extent and, in any event, those

[8] In a case currently pending, the Supreme Judicial Court may address the extent to which a hearing examiner may discount the opinion of a plaintiff's psychological expert. See Doe, Sex Offender Registry Bd. No. 23656 v. Sex Offender Registry Bd., SJC-12695. Doe has asked that we stay his appeal pending a decision by the Supreme Judicial Court in that case. Having reviewed the briefs and oral argument in SJC-12695, we have concluded that the issues raised in the two cases are sufficiently distinct that a stay is unwarranted. We therefore deny the plaintiff's motion to stay.

findings are not clearly erroneous. One example will suffice. Doe argues that the hearing examiner erroneously concluded that he "had not come to terms with his sexual attraction to pubescent children," because -- as the hearing examiner also noted -- Doe had "acknowledge[d] his long-standing attraction to young adolescents" in a relapse prevention plan. However, in reaching her conclusion, the hearing examiner had also considered that, years later Doe indicated that his offenses against Jane were motivated out of "his feelings of anger and rejection" by Jane's mother, rather than his own sexual desires. Thus, the hearing examiner's conclusion was not clearly erroneous.

The question remains whether the hearing examiner's subsidiary factual findings taken together amounted to clear and convincing evidence. See Doe No. 380316, 473 Mass. at 311. "We review the [hearing] examiner's finding that clear and convincing evidence supported the classification to determine whether it was supported by substantial evidence." Doe, Sex Offender Registry Bd. No. 523391 v. Sex Offender Registry Bd., 95 Mass. App. Ct. 85, 94 (2019) (Doe No. 523391). See Doe No. 380316, supra. "Proof by clear and convincing evidence is 'not without teeth,' Matter of G.P., 473 Mass. 112, 120 (2015), . . . [and] the evidence must be sufficient to convey a 'high degree of probability' that the contested proposition is true." Doe

No. 380316, supra at 309, quoting Callahan v. Westinghouse Broadcasting Co., 372 Mass. 582, 588 n.3 (1977). This "means that '[t]he requisite proof must be strong and positive; it must be 'full, clear and decisive.'" Adoption of Chad, 94 Mass. App. Ct. 828, 838 (2019), quoting Adoption of Iris, 43 Mass. App. Ct. 95, 105 (1997).[9]

The hearing examiner issued a thoughtful, thirty-two page decision following three separate administrative hearings in which she heard testimony relating to Doe's classification. See note 1, supra. Examining the facts set forth in the hearing examiner's decision in relation to the regulatory risk factors that she was required to apply, we conclude that her subsidiary factual findings met the requisite clear and convincing standard. See Doe No. 380316, 473 Mass. at 311. The hearing examiner found that two "high risk" factors applied to Doe, which the Legislature has described as being "indicative of a high risk of reoffense and degree of dangerousness posed to the public."[10] 803 Code Mass. Regs. § 1.33. She also found that four risk-elevating factors applied to Doe, and noted that one such factor -- factor 22 (number of victims) -- was "extremely

[9] In reviewing a hearing examiner's finding, "we may usefully analogize to care and protection cases, where we review determinations of parental unfitness made under the clear and convincing standard." Doe No. 523391, 95 Mass. App. Ct. at 94.

[10] Factor 2 (repetitive and compulsive behavior) and factor 3 (adult with child victim).

aggravating."[11] Further, she carefully considered the risk mitigating factors, giving many of them "some" or "temper[ed]" consideration, and several of them full mitigating consideration.[12] The hearing examiner also examined additional factors, including victim impact statements from both Jane and her mother, and the report and testimony from Dr. Bard. Although the hearing examiner harbored considerable skepticism about Dr. Bard's conclusion that Doe posed a low risk to reoffend, she did spend over four pages analyzing his findings, and reiterated several of his observations about Doe, including that "when things get bad, old behaviors kick in." Because we find the evidence cited in the hearing examiner's decision to be "full, clear and decisive," we affirm her conclusion that clear

[11] Factor 7 (relationship between offender and victim), which was considered an "aggravating" factor; factor 20 (diverse sexual behavior), which was considered an "aggravating" factor; factor 21 (diverse victim type); and factor 22 (number of victims), which was considered an "extremely aggravating" factor.

[12] Factor 28 (supervision by probation or parole); factor 30 (advanced age), which was given "some" consideration; factor 32 (sex offender treatment), which was given "temper[ed]" mitigating consideration; factor 33 (home situation and support systems), which was given "temper[ed]" mitigating consideration; and factor 34 (materials submitted by sex offender regarding stability in community). The hearing examiner also noted that Doe had not met the five years required to receive mitigating consideration for factor 29 (offense-free time in community), and also did not consider factor 31 (Doe's physical condition) to be a mitigating factor.

and convincing evidence supported Doe's level 3 classification.[13] Adoption of Chad, 94 Mass. App. Ct. at 838, quoting Adoption of Iris, 43 Mass. App. Ct. at 105.

3. Public dissemination. Finally, Doe argues that the hearing examiner failed to consider "whether and to what degree public access to the offender's personal and sex offender information, pursuant to [G. L. c. 6, § 178K], is in the interest of public safety," in accordance with 803 Code Mass. Regs. § 1.20(2)(c), and that any such dissemination violates his constitutional right to due process. Specifically, Doe argues that dissemination of his personal information on the Internet would serve no purpose, nor would it be in the interest of public safety, because his past offenses were not against

[13] Doe further criticizes his level 3 classification by arguing that it was "based entirely upon his behavior [from] over a decade ago," rather than on his current risk of reoffending or degree of dangerousness. He also argues that, because he addressed every mitigating factor and still was classified as a level 3 sex offender, any hope of having his classification lowered was a "hollow promise." We note that, although the hearing examiner addressed all possible mitigating factors in her decision, she afforded some of the factors only tempered weight or no mitigating weight at all. Thus, recognizing that every sex offender is "entitled to an individualized determination whether he is currently dangerous before registration and notification requirements may be imposed," the hearing examiner acted within her discretion in weighing the severity of Doe's past offenses alongside the factors relevant to minimizing his risk of reoffending or his degree of dangerousness. See Doe, Sex Offender Registry Bd. No. 6904 v. Sex Offender Registry Bd., 82 Mass. App. Ct. 67, 73 (2012). We credit her determination that Doe currently poses a high risk of reoffending. See id.

strangers, but rather against children with whom he already had a personal relationship. Doe argues that under these circumstances, a drastic "curtailment of private interests" is not appropriate.

After this case was briefed and argued, the Supreme Judicial Court decided Doe, Sex Offender Registry Bd. No. 496501 v. Sex Offender Registry Bd., 482 Mass. 643 (2019) (Doe No. 496501), and held that in addition to determining a petitioner's risk of reoffense and degree of dangerousness, "[a] third and distinct determination is required by SORB regulations: 'whether and to what degree public access to the offender's personal and sex offender information . . . is in the interest of public safety.'" Id. at 654, quoting 803 Code Mass. Regs. § 1.20(2). This third prong must be evaluated "'in consideration' of the offender's risk of reoffense and dangerousness."[14] Doe No. 496501, supra at 655. The Supreme Judicial Court explained that this new requirement is to be applied prospectively only, but that if a case currently is pending on appeal the appellate court has discretion to remand the classification. See id. at 657.

[14] Further, the Supreme Judicial Court clarified that in sex offender classification cases, each element of the ultimate classification requires a separate finding, and each must be established by clear and convincing evidence. See Doe No. 496501, 482 Mass. at 655-656.

In the case before us, the hearing examiner in fact did find that Internet dissemination was warranted, leaving Doe to argue at most that the level of analysis or explanation that the hearing examiner provided was inadequate, or the evidentiary record insufficient. Doe did not claim such deficiencies in the Superior Court, and such arguments therefore are waived. See Weiler v. PortfolioScope, Inc., 469 Mass. 75, 86 (2014). Moreover, whether Doe's argument in this court rises to the level of that required by Mass. R. A. P. 16, as appearing in 481 Mass. 1628 (2019), lies in some doubt. In any event, as explained below, to the extent we have discretion to remand this case for further findings in light of Doe No. 496501, we would not do so under the circumstances presented. See Doe No. 496501, 482 Mass. at 657-658 & n.4.

Throughout his challenge to SORB's classification, Doe focused almost entirely on the hearing examiner's finding that he posed a high risk of reoffending; he made virtually no argument that the hearing examiner erred in determining that he posed a high degree of dangerousness if he reoffended. This is unsurprising given the number and nature of the offenses at issue here, all of which involved children and three of which were for indecent assault and battery against a child under fourteen. The case before us thus involves far more serious offenses than those at issue in Doe No. 496501, which involved

only noncontact offenses. See id. at 647-648. With Doe's behavior having escalated to include such offenses, the third prong is readily satisfied. See id. at 655. In addition, Doe's stranger-based argument is unpersuasive on the facts. For example, Jane was a child placed in Doe's care by her parents; active Internet dissemination would serve to prevent that. In sum, the correctness of the hearing examiner's finding that "active notification of [Doe's] information is warranted to ensure public safety" is not subject to such doubt that a remand on that issue is warranted. Finally, in the circumstances of this case, which include Doe's having received notice and a fair hearing prior to classification, he has not shown any due process violation. See Coe, 442 Mass. at 257-258. The judgment is therefore affirmed.

So ordered.

By the Court (Milkey, Neyman & Englander, JJ.[15]),

Joseph F. Stanton

Clerk

Entered: August 9, 2019.

[15] The panelists are listed in order of seniority.